BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY	)	
Complainant,	)	
v.	)	**Docket No. 42056**
BNSF RAILWAY COMPANY	)	
Defendant.	)	

42056

REPLY OF BNSF RAILWAY COMPANY TO PETITION FOR RECONSIDERATION

BNSF hereby responds in opposition to the Petition for Reconsideration filed by Texas Municipal Power Agency ("TMPA") on August 16, 2011 in the above-captioned matter.

SUMMARY OF ARGUMENT

TMPA seeks reconsideration of the Board's July 27, 2011 decision denying TMPA's December 17, 2010 request that the Board "enforce" an expired rate prescription against BNSF by extending the prescription beyond its original term through 2010 through the first quarter 2021. The Board correctly denied TMPA's request, which sought to have the Board interpret its prior rate prescription in this case in a way that contradicted the clear language of the Board's prior decisions imposing the prescription. TMPA has provided no valid reason to reconsider the Board's July 27, 2011 decision.

In its petition for reconsideration, TMPA first argues that the Board could not have established a 10-year rate prescription in this case since such a rate prescription would have been inconsistent with precedent. But precedent is irrelevant in determining the scope of the rate prescription here because the Board unambiguously defined the scope of the rate prescription in

its decisions. TMPA conspicuously ignores the clear language of the Board's decisions limiting the rate prescription to the period 2001-2010. Moreover, even if TMPA were correct that a 10-year rate prescription was a departure from precedent – an assertion that is not correct, as explained below – TMPA should have raised the issue on appeal but it failed to do so.

Second, TMPA argues that the Board erred in finding that TMPA failed to raise its concerns about "netting" in a timely fashion. TMPA's argument about netting is simply a variation on its argument about precedent and it fails for the same reason. TMPA argues that the Board could not have meant to establish a 10-year rate prescription because such a prescription would be inconsistent with the logic underlying the Board's netting practice. But regardless of the validity of TMPA's claims about the supposed logic of netting – and again, TMPA's substantive arguments about the logic of netting are incorrect – the Board clearly defined the scope of the rate prescription in its decisions in this case and specified that the rate prescription would last only through 2010. If TMPA thought that the Board's clearly defined rate prescription was inconsistent with the logic of netting, then TMPA should have brought a timely appeal of the Board's prior decision, which TMPA failed to do.

Finally, TMPA argues that it was material error for the Board in its July 27, 2011 decision to apply retroactively its current rule that rates are prescribed in stand-alone cost ("SAC") cases for no more than 10 years. The short answer to this assertion of error is that the Board did *not* apply its current rule on the scope of rate prescriptions retroactively. The Board's July 27, 2011 Decision simply acknowledged what the Board had said in its prior TMPA decision in unambiguous language, namely that the Board, in 2004, prescribed rates in this case only through 2010.

ARGUMENT

I. TMPA's Argument That Board Precedent Requires The Prior Decisions To Be Read As Imposing A Twenty Year Rate Prescription Ignores The Unambiguous Language Of The Board's Earlier Decisions Prescribing Rates Through 2010.

TMPA seeks reconsideration of the Board's finding in the July 27, 2011 decision that the rate prescription in this case expired at the end of 2010. TMPA's primary argument is that the Board's prior decisions in this case – a decision served on March 24, 2003 ("2003 Decision") and a decision served on September 27, 2004 ("2004 Decision") – could not have prescribed rates for only ten years because such a rate prescription would not have been consistent with precedent. *See, e g.*, TMPA Petition for Reconsideration at 3.

TMPA's reliance on precedent to determine the scope of the rate prescription in this case is misplaced. It is unnecessary to look to precedent to determine the scope of the rate prescription since the Board's prior decisions defined the scope of the rate prescription in direct and unambiguous language. As the Board explained in the July 27, 2011 Decision, "[t]he plain language of the Board's decisions in this case is contrary to TMPA's position" that the rate prescription extended beyond 2010. July 27, 2011 Decision at 4. The Board correctly found that "the Board's language [in the prior decisions] makes clear that the agency ordered relief only through 2010." *Id.*

That should be the end of the inquiry. The scope of a rate prescription is defined by the language used to establish the rate prescription, not by inference from precedent or the supposed "logic" of the Board's SAC analysis. In *West Texas Utilities Company v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 41911 (STB served May 29, 2003) ("*2003 WTU Decision*"), BNSF identified a clear error in the Board's prior decision in that case to prescribe rates at the jurisdictional threshold notwithstanding that the SAC rate was for some

years higher than the jurisdictional rate. BNSF asked the Board to declare that its prior decision actually prescribed rates at the higher of the jurisdictional threshold or the maximum SAC-based rate, a result required by the statute. The Board agreed that its prior decision was inconsistent with the statute, but the Board nevertheless rejected BNSF's request, noting that "[t]he prior decision was unambiguous, however, so it is inappropriate to declare that it said something different from what it actually said." *2003 WTU Decision*, at 2. The Board is not free to disregard the clear language of a rate prescription, regardless of the validity of the reasoning that led to the rate prescription.

The only reference in TMPA's petition for reconsideration to the Board's specific definition of the scope of the rate prescription in the prior decisions is TMPA's "acknowledge[ment]" that the rate prescription table included in the 2004 Decision blacked out the years 2011-2021 in the "STB Prescribed Rate" column. TMPA Pet. For Recon. at 10, note 6. TMPA suggests that there might have been some ambiguity in the table as to the scope of the rate prescription. But there is no reasonable interpretation of the table other than to conclude that the Board prescribed rates only for the years in which a rate was specifically included in the column titled "STB Prescribed Rate" and that the Board did not prescribe a rate for the years that were blacked out. Moreover, TMPA completely ignores other clear language in the Board's decisions, including the statement in the 2003 Decision that "we find the challenged rate to be unreasonable and we prescribe a maximum reasonable rate *through the year 2011*." 2003 Decision, 6 S.T.B. at 608 (emphasis added). TMPA sought reconsideration of the 2003 Decision, but the reconsideration petition was silent on the question of the time period of the rate prescription. On reconsideration, the Board in its 2004 Decision shortened the rate prescription

period to 2001-2010 and TMPA similarly declined to seek reconsideration of the 2004 Decision or to appeal that Decision.

Since the language of the Board's decisions clearly defined the scope of the rate prescription, it is unnecessary for the Board to address TMPA's lengthy and confused discussion of precedent on the subject of the scope of rate prescriptions in SAC cases. However, TMPA mischaracterizes the case law at the time of the prior decisions in this case. There is no dispute that SAC analyses were at the time generally conducted based on 20-year cash flow projections. But there is no discussion in the pre-2004 SAC cases of the question whether the rate prescription period should always conform to the cash-flow analysis period.

In a few SAC cases, the defendant was found to have overcharged shippers in each year of the cash-flow period and a rate was prescribed for each year of the cash-flow period. *See, e.g., Wisconsin Power & Light v. Union Pacific Railroad Company*, 5 S.T.B. 955, 1039 (2001). In one case, *Arizona Public Service v. Atchison Topeka & Santa Fe Railway*, 2 S.T.B. 367 (1997), the Board prescribed rates over the entire cash-flow period even though the challenged rate was not found to exceed the SAC maximum rate in some years. But the rate prescription in that case was the product of a complex iterative methodology that proved to be so convoluted that it was never followed in any subsequent case. *See* 2 S.T.B. at 391-95 (describing methodology). In 2006, the Board, in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006), directly addressed the question of whether the rate prescription period should correspond to the cash-flow analysis period and it concluded that a rate prescription would extend "no more than" the period over which cash flows were analyzed, leaving open the possibility that a rate prescription could be made for something less than the full cash-flow period if circumstances warranted a shorter rate prescription.

In the *TMPA* proceeding, the Board reasonably concluded in 2004 that the rate prescription should be limited to the years 2001-2010. As the Board explained in the July 27, 2011 Decision, "the agency concluded (in 2004) that TMPA was eligible for relief from BNSF's unreasonable rates from 2001 to 2010, but not from 2011 to 2021, because BNSF's forecasted rates were not shown to be unreasonable in the latter years." July 27, 2011 Decision at 4. Indeed, the statute gives the Board discretion to prescribe rates only where the Board has found that the challenged rate "does or will" violate the statute, which is not the case here for the period 2011-2021. 49 U.S.C. §10704(a)(1). But even if the Board had legal authority to prescribe rates for 2011-2021, it chose not to do so and made that decision abundantly clear in defining the scope of the rate prescription. TMPA failed to challenge that decision on appeal, and it is too late to challenge that decision here.

II. The Board Correctly Found That TMPA's Concerns About Netting Were Not Timely Raised.

TMPA also takes issue with the Board's conclusion in the July 27, 2011 Decision that TMPA did not timely raise questions about the way the Board carried out its "netting" procedures in the 2003 and 2004 Decisions. TMPA Pet. For Recon. at 13. TMPA's discussion of the netting issue in its Petition is particularly confused. The argument on netting appears to be a variant on TMPA's argument, addressed above, that the Board should interpret the 2003 and 2004 Decisions based on inferences from precedent rather than on the plain language of the decisions.

Specifically, TMPA argues that the Board, in the July 27, 2011 Decision, should have interpreted the scope of the 2003 and 2004 rate prescriptions in light of the supposed logic underlying the netting process. According to TMPA, netting is a process that "account[s] for a full 20-year period," so the rate relief should cover the same 20-year period. TMPA Pet. for

Recon. at 13. While it is true that the netting process looks at cash flows over the entire 20-year period, TMPA ignores the objective of netting. The purpose and effect of netting in this case was to ensure that the revenues of the stand-alone railroad would be reduced only by an amount necessary to eliminate BNSF's total over-recovery as calculated in the 20-year SAC analysis. *See* BNSF's Reply to TMPA's Petition for Enforcement of Decision at 13 (filed January 6, 2011). The Board properly used netting in this case to ensure that the total over-recovery was eliminated through rate reductions in each year that BNSF was projected to have an overcharge, *i.e.*, 2001-2010.

However, it is not necessary for the Board to address TMPA's claims about the objective of netting and its implications for any rate prescription because the scope of a rate prescription is not defined through inferences drawn from the supposed logic underlying the SAC analysis. As discussed above, a rate prescription is defined by the specific language of the Board decision establishing that prescription. Whether TMPA would have had a valid basis for challenging the Board's decision to prescribe a rate only for the years 2001-2010 based on TMPA's theory of netting is beside the point. The Board unambiguously defined the scope of the rate prescription as limited to the period 2001-2010 and TMPA failed to challenge that decision in a timely appeal.

III. The Board Did Not Retroactively Apply The Current Rule Limiting Rate Prescriptions To 10 Years.

Finally, TMPA argues that the "retroactive application of the 10-year rule to TMPA's rate case is material error." TMPA Pet. For Recon. at 18. TMPA seems to realize that it mischaracterizes the Board's July 27, 2011 Decision, as it states that "the Board's discussion of reopening [in which the reference to the 10 year rule arose] appears to be dicta." Indeed the Board did not find that the rule adopting a 10 year SAC analysis period applies here. Instead, the

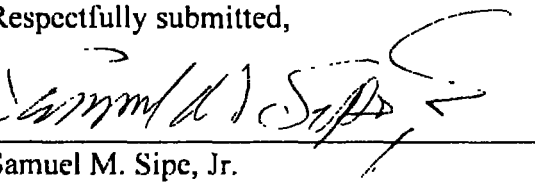
Board found that the rate prescription in this case expired at the end of 2010 based on the clear language of the Board's prior decisions in this case. Because the Board did not retroactively apply the current 10-year rule as a means of limiting TMPA's rate relief, TMPA's assertion of error is without any foundation.

The Board cited the current rule that limits rate prescriptions to no more than 10 years as one of several factors supporting its decision not to reopen the rate prescription on the Board's own initiative. But TMPA does not challenge the Board's decision not to reopen. Indeed, TMPA repeats its prior rejection of any reopening option, stating that "there would be nothing to reopen if, as the Board declares, the prior decisions were clear that TMPA's relief ended after 10 years. . . ." TMPA Pet. For Recon. at 17. The Board properly found that the prior decisions were clear that TMPA's relief ended after 10 years, and the Board reasonably concluded that there was no reason to reopen that decision now.

CONCLUSION

For the reasons set forth above, the Board should deny TMPA's Petition for Reconsideration.

Respectfully submitted,



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September 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 6th day of September, 2011, I served a copy of the Reply of BNSF Railway Company to Petition for Reconsideration to the following by US. Mail:

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